

# The Register-Guard

---

Opinion

## Guest View: A telling lack of justice

Posted Jun 18, 2020 at 12:01 AM

Prosecutors initially charged police officer Derek Chauvin with second-degree manslaughter and third-degree murder for the killing of George Floyd. After protests, Chauvin was charged with second-degree murder. Why not first-degree murder?

A conviction for first-degree murder would trigger a mandatory life sentence in Minnesota whereas second-degree manslaughter could mean anything from a fine up to 10 years in prison. Prosecutors make these high-stakes decisions about what to charge with very little transparency or accountability.

That needs to change.

Research has shown that prosecutorial discretion not only favors police officers but also is also liable to racial bias. One study, for example, found that prosecutors in the 1980s chose to seek the death penalty in 70% of cases involving black defendants and white victims, but only 19% of cases involving white defendants and black victims. Against Justice Brennan's criticism that this disparity "reflects a devaluation of the lives of black persons," the Supreme Court condoned it as the result of prosecutorial discretion that is "firmly entrenched."

That entrenchment needs to end. At a minimum, we need transparency and accountability in how prosecutors use their discretion, especially in regard to race and police officers. We can start by getting answers about why Chauvin hasn't been charged with first-degree murder.

An answer along the lines of “there isn’t enough evidence” doesn’t cut it. It might be enough if a premeditated intent to kill were required for first-degree murder. But Minnesota has two other types of first-degree murder that fit here and do not require a premeditated intent to kill.

First, murder in the first-degree can be charged if there is probable cause to believe that a person had (1) intent to kill and (2) caused death while committing a certain felony. Intent to kill means either a conscious objective to kill or knowledge that one’s actions will cause death. Chauvin kept his knee pressed into George Floyd’s neck for over two minutes after Floyd said he could not breathe, after he said “Mama, I’m through,” and after he became clearly nonresponsive. That gives me probable cause to believe Chauvin knew that he was causing death.

There is also probable cause to believe that Chauvin caused Floyd’s death while committing one of the specified felonies: kidnapping. A person commits kidnapping in Minnesota if he confines another person without consent in order to terrorize the person. “Terrorize means to cause extreme fear by use of violence or threats,” according to Minnesota caselaw. Chauvin confined Floyd, and I see probable cause that he intended to cause extreme fear when he chose to keep his knee digging into Floyd’s neck after hearing Floyd cry “please!” and “I can’t breathe!”

A different way to charge first-degree murder requires showing probable cause that, even if a person lacked intent to kill, he nevertheless had extreme indifference to life and caused death in the course of a felony that “furthers terrorism.” A felony “furthers terrorism” if it is a premeditated act of violence that is intended to terrorize or intimidate members of the public in addition to the direct victim. From the public video, it looks like Chauvin was putting on a brutalizing show of force to instill fear not only in Floyd, but in the other black people watching him, and among the black community who would later watch the footage. It was an act of racial terror – and that would make it first-degree murder under Minnesota law.

I am not explaining these charges because I believe that prosecutors should always seek the most severe charges. Doing so drives mass incarceration and can set a dangerous precedent for future cases. If there are compelling arguments against charging Chauvin with first-degree murder, we need to hear prosecutors make those arguments. And we need independent investigation into whether prosecutors have applied the same standard in past cases regardless of race or a police uniform. If other defendants have been overcharged relative to Chauvin, their cases deserve a second look.

In my experience, I have seen far too many black, brown and poor teenagers charged with the most severe crimes possible and given extreme, mandatory sentences without a second thought.

If we allow a double standard to operate behind closed doors, we do not have “a criminal justice system” in America. What we have are two systems, neither of which deserves the adjective “justice.”

*Kristen Bell, J.D., Ph.D., is an assistant professor at the University of Oregon School of Law.*